HARVARD LAW REVIEW

Published monthly, during the Academic Year, by Harvard Law Students

SUBSCRIPTION PRICE, $4.50 PER ANNUM . . . . . 60 CENTS PER NUMBER

FEDERAL TAXATION OF EMPLOYERS OF CHILD LABOR. — It is common knowledge that the main purpose of the federal tax of 1919 upon income derived from the products of child labor [1] was to discourage the employment of children in industry, and that any intention or expectation of raising revenue thereby was at best epiphenominal.[2] On the other hand, the statute appears upon its face to be an excise tax within the language of the constitutional grant of power of taxation.[3] Is it

[1] See Act Feb. 24, 1919, c. 18, §§ 1200 *et seq.*, 40 STAT. AT L., 1057, 1138; 1919 COMP. STAT. ANN. SUPP., §§ 6336a–6336h. The act imposes an annual tax, in addition to all other taxes, of 10 per cent of the net income derived from the products of mines, mills, etc., in which during the year children under certain ages have been employed or where children have been permitted to work longer than certain hours.

[2] See CONGRESSIONAL RECORD, Dec. 18, 1918, p. 620; 31 YALE L. J. 310, 311. "The question . . . is whether the last act is intended to raise revenue. It will scarcely be insisted that such is its object." *Per* Boyd, J., in George *v.* Bailey, 274 Fed. 639, 641–642 (W. D. N. Car., 1921). "The purpose of the act in question appears upon its face. It is disclosed by its title and by its scope and inevitable effect. Through the medium of a tax, Congress here, as through the medium of a regulation of commerce in the act of Sept. 1, 1916 (c. 432, 39 STAT. 675), has attempted to fix the standard of labor for mines, quarries, factories, mills, etc., in the various states. The act was not intended to, nor will it, raise revenue. This was admitted, if not openly declared, by its sponsors during its passage through Congress." *Per* Boyd, J., in Drexel Furniture Co. *v.* Bailey, 276 Fed. 452, 454 (W. D. N. Car., 1921).

[3] "The Congress shall have Power (1) To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Wel-

nevertheless unconstitutional, because it in effect regulates and was intended to regulate the methods of manufacturing in the several states, a field over which Congress has neither expressly nor impliedly been given any power of direct control?[4] In *Hammer* v. *Dagenhart*,[5] by five justices to four, the Supreme Court held unconstitutional a statute prohibiting the shipment in interstate commerce of the products of industrial units in which child labor had been employed.[6] To this decision the prompt answer of Congress was the tax law here considered. This statute is now before the courts. It has twice been held unconstitutional in a lower federal court,[7] in reliance upon the authority of *Hammer* v. *Dagenhart*.[8] But although the present tax and the condemned restriction upon interstate shipment have this close historical connection and involve questions intimately allied, it does not follow that they must meet the same fate before the Supreme Court. The later statute purports to exercise a different power, and it is necessary to examine the background of precedent with particular reference to that power.

Prior to 1869 there was no decision bearing directly upon the question, although there had been considerable judicial affirmation of the generally unlimited nature of the taxing power of Congress.[9] In that year, how-

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fare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." CONSTITUTION OF THE UNITED STATES, Art. 1, § 8. For a discussion of the now discredited doctrine that the "general welfare" provision conferred a full national police power, see Robert E. Cushman, "The National Police Power," 3 MINN. L. REV. 289, 293–295.

[4] "The objection urged against the power is that the States have exclusive control over their methods of production, . . . and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it." *Per* Holmes, J., dissenting, in Hammer *v.* Dagenhart, 247 U. S. 251 (1918).

[5] 247 U. S. 251 (1918).

[6] This decision and the statute with which it was concerned invoked a vast amount of discussion. It is commented upon adversely in Thurlow M. Gordon, "The Child Labor Law Case," 32 HARV. L. REV. 45. References to many articles are collected in 30 YALE L. J. 310; and in Robert E. Cushman, "The National Police Power," 3 MINN. L. REV. 452, 456 n., 471 n.

[7] George *v.* Bailey, *supra;* Drexel Furniture Co. *v.* Bailey, *supra*. For the facts of these cases see RECENT CASES, *infra*, p. 881.

[8] 247 U. S. 251 (1918). Judge Boyd, who decided the case which was affirmed in Hammer *v.* Dagenhart, also decided the cases cited in the preceding footnote. He follows that case rather complacently; and the more so, apparently, that it tends to decentralization of powers. "If therefore, the statute under consideration either directly or by its necessary operation substantially and necessarily disturbs the states in their control of their internal affairs, it must be held invalid, whatever may have been the professed purpose for which it was enacted" (relying upon the Tenth Amendment), Drexel Furniture Co. *v.* Bailey, *supra*, at 453. But such language can hardly stand after the intrastate rate case. Houston & Texas Ry. *v.* United States, 234 U. S. 342, 351–352 (1914). See Thomas Reed Powell, "The Child Labor Law, the Tenth Amendment, and the Commerce Clause," 3 So. L. QUART. 175, 184. Railroad Commission of Wisconsin *v.* Chicago, Burlington & Quincy R. R. Co., U. S. Sup. Ct., Oct. Term, 1921, 206. See 35 HARV. L. REV. 864, 886.

[9] "That the power to tax involves the power to destroy, that . . . are propositions not to be denied." *Per* Marshall, C. J., in McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 431 (1819). "The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion." *Per* Chase, C. J., in Li-

ever, in *Veazie Bank* v. *Fenno*,[10] a destructively high tax upon the circulation as money of the notes of state banks was upheld as constitutional. Two grounds were given: (1) that the power to tax is subject to no limitation which the courts will enforce — that it may not be exercised oppressively, but only to the control of the electorate through the ballot;[11] and (2) that the tax was appropriate to aid legislation aimed at securing a sound national currency.[12] It is hard to say that either *ratio decidendi* was meant to have superior force. The second soon became fixed in decisions; [13] while for a time the tide seems to have set somewhat against the first, so far as it asserts a bar to inquiring into the motives of Congress.[14] But this tide was turned. The general comment of the court upon the breadth of the taxing power continued.[15] Then in *In re Kollock*,[16] a federal statute was said to be "on its face an act for levying taxes and . . . its primary object must be assumed to be the raising of revenue."[17] And in *McCray* v. *United States*,[18] it was squarely held (1) that the motives of Congress in the exercise of its granted powers are not a matter for the court's inquiry; (2) that an act on its face an excise tax is within the grant of power of taxation; and (3) that a tax destruc-

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cense Tax Cases, 5 Wall. (U. S.) 462, 471 (1866). Similarly, *per* Swayne, J., in Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 443–446 (1868). This is the sort of broad language usually used in connection with the express grants of power in the Constitution. Similar is the sweeping characterization of the power to regulate commerce, — "like all others vested in Congress," — *Per* Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 196–197 (1824).

[10] 8 Wall. (U. S.) 533 (1869).

[11] *Id.*, p. 548.

[12] *Id.*, p. 548–549. The passages referred to fllustrate neatly the usual language of the court concerning express and implied powers respectively. As a tax, the court will not even question its source in motives or effect; as an indirect means of controlling the currency the court is at pains to find that it is appropriate to the furtherance of an express power. Thus Marshall, C. J., in a case of *implied* powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." See McCulloch *v.* Maryland, *supra*, at 421. See also *id.*, p. 425; Hepburn *v.* Griswold, 8 Wall. (U. S.) 603, 613–614 (1869); Legal Tender Cases, 12 Wall. (U. S.) 457, 539–540 (1870) (Hepburn *v.* Griswold, *supra*, overruled). It cannot be permissible to cite such expressions as allowing inquiry into the ends sought by Congress where the legislation is clearly within an *express* grant of power, and not contrary to the Fifth Amendment, or to some limitation such as that precluding taxation of state agencies employed about governmental functions. Yet they may, perhaps, be relevant upon the question of whether an act upon its face within such a power is really within its scope when the sole and necessary result of the statute is one disconnected from the objects for which the power was given.

[13] National Bank *v.* United States, 101 U. S. 1 (1879) (a similar tax upon circulation of notes of municipalities, etc.). See Legal Tender Cases, *supra*, at 544–545; Head Money Cases, 112 U. S. 580, 596 (1884).

[14] Judge Cooley seems to have thought that a "tax" for the bare purpose of destruction could not be valid. See 1 COOLEY, TAXATION, 3 ed., 14. *Cf.* Head Money Cases, *supra*, at 596; Loan Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 663–664 (1874).

[15] See, for example, United States *v.* Singer, 15 Wall. (U. S.) 111, 121 (1872); Springer *v.* United States, 102 U. S. 586, 593 (1880); Spencer *v.* Merchant, 125 U. S. 345, 355 (1888). The court will not inquire into the reasonableness of the amount of the tax. Patton *v.* Brady, 184 U. S. 608, 623 (1902).

[16] 165 U. S. 526 (1897).

[17] *Id.*, at 534.

[18] 195 U. S. 27 (1904).

tively high is not, merely therefore, invalid. This decision has since been uniformly cited with complete approval.[19]

Upon these precedents, the problem of the tax may be stated thus. The arguments against its validity are four: (1) it is not a tax within the meaning of the taxing power; (2) it is a tax, but affects the internal affairs of the states, and is therefore invalid by virtue of an implied constitutional limitation; (3) it is a tax, but the motives of Congress were not tax motives; and (4) it is destructive of fundamental rights which no free government can destroy. The answers are: that it is upon its face quite as much a tax as were the enactments in *Veazie Bank* v. *Fenno*, *In re Kollock*, or *McCray* v. *United States;* that there is no such implied limitation;[20] that the court has no concern with the objects or motives of legislation when in the immediate exercise of express powers;[21] and that the right to employ child labor is hardly a "fundamental right" when it can be restrained by any state under its police power.[22] Does *Hammer* v. *Dagenhart* alter any of these answers? That depends upon the *rationale* of that decision, a somewhat difficult question upon its language alone, but easier upon reading it in conjunction with other authority. The second and third arguments cannot have been intended, as both have been rejected in a subsequent decision.[23] The fourth is answered just as in the tax problem.[24] That leaves only the first ground, namely, that the statute there was not a regulation of commerce within the meaning of the Constitution. It is easier to say that the case is wrong;[25] but it is not hopelessly impossible to say that this argument

[19] The cases are numerous. See, for example, Flint *v.* Stone Tracy Co., 220 U. S. 107, 154 (1911); United States *v.* Doremus, 249 U. S. 86, 93 (1919); Hamilton *v.* Ky. Distilleries Co., 251 U. S. 146, 161 (1919).

[20] Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533 (1869); Knowlton *v.* Moore, 178 U. S. 41 (1900); McCray *v.* United States, 195 U. S. 27 (1904); Hamilton *v.* Ky. Distilleries Co., *supra*, and cases cited *id.*, p. 156. The only limit is against interference with governmental activities of the states. Collector *v.* Day, 11 Wall. (U. S.) 113 (1870); South Carolina *v.* United States, 199 U. S. 437 (1905).

[21] Veazie Bank *v.* Fenno, *supra;* McCray *v.* United States, *supra;* Hamilton *v.* Ky. Distilleries Co., *supra.*

[22] Sturges *v.* Beauchamp, 231 U. S. 320 (1913). See Thomas Reed Powell, *supra*, 194. In the McCray case, White, J., held that, conceding, for argument only, that some taxation might possibly be so arbitrary and destructive of "fundamental rights" that it would be invalid, yet the tax in that case could not be so considered since its subject matter — sale of oleomargarine — could be prohibited by a state under the police power. McCray *v.* United States, *supra*, at 62–64. In other words, the only limitation is one of due process — the Fifth Amendment read in conjunction with the grants of power which it restricts.

[23] "When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power or that it may tend to accomplish a similar purpose." *Per* Brandeis, J., in Hamilton *v.* Ky. Distilleries Co., *supra*, at 156. *Acc.*, Houston & Texas Ry. *v.* United States, note 9, *supra*, under the commerce clause, not cited in Hammer *v.* Dagenhart. "No principle of our constitutional law is more firmly established than that the court may not, in passing upon the validity of a statute, enquire into the motives of Congress." *Per* Brandeis, J., in Hamilton *v.* Ky. Distilleries Co., *supra*, at 161. *Acc.*, Smith *v.* Kansas City Title Co., 255 U. S. 180 (1921).

[24] See note 22, *supra.*

[25] Compare the argument in Thomas Reed Powell, *supra*, attacking the decision, with that of Andrew A. Bruce, "Interstate Commerce and Child Labor," 3 MINN. L. REV. 89, supporting it.

is good, and that the *Lottery*[26] and *White Slave* cases[27] are distinguishable. For the evils to be prevented in those cases were evils of consumption, for which the primary object of transportation is to furnish time and place utilities; and perhaps prohibitions aimed at such evils may be regulations of transportation and commerce, while prohibitions aimed at evils of production, which are served more indirectly by the transportation in question, may not be such regulations. This furnishes at least a distinction in degree, and may be grasped at without denying the main principle; namely, that if a statute *is* a regulation of commerce it is valid for all of the other arguments above.

Placed upon this ground, *Hammer* v. *Dagenhart* is not necessarily controlling of the tax question.[28] In the first place, there were not as close precedents in that case as there are in this.[29] In the second, that decision has not been treated by the court as at all discrediting the *McCray* case.[30] In the third, the tax power has always been one of the broadest powers of government, and if any difference is to be accorded, may receive the more liberal treatment.[31] And in the fourth, the error of *Hammer* v. *Dagenhart*, if any, lies not in the test but in its application. The test which the precedents justify, and practical statesmanship demands, is this: examine the statute and the Constitution; compare them with the strongest presumption in favor of the correspondence of the former to some power granted in the latter; and unless the lack of correspondence is apparent, then the statute is constitutional unless it offends some express[32] or some — rarely — implied[33] limitation within the Constitution itself. The *rationale* of *Hammer* v. *Dagenhart* must be that the court is affirmatively able to deny such a correspondence of the statute to the commerce power because the former's sole and necessary result is one disconnected from the objects of that power.[34] One

[26] Champion *v.* Ames, 188 U. S. 321 (1903).

[27] Hoke *v.* United States, 227 U. S. 308 (1913). Similarly of the Pure Food and Drugs Act. Hipolite Egg Co. *v.* United States, 220 U. S. 45 (1911); Weeks *v.* United States, 245 U. S. 618 (1918).

[28] Non-judicial opinion favors the validity of the tax. See 31 YALE L. J. 310, 314; 17 MICH. L. REV. 83, 87. But see Andrew A. Bruce, *supra*, 101–103. A ground of unconstitutionality might be that the classification is unreasonable since it bears upon a whole year's income, regardless of the actual extent to which child labor is employed during the year, and is therefore more in the nature of a penalty. *Cf.* Thurlow M. Gordon, *supra*, 45.

[29] The McCray case is fully in point upon the tax question, while the cases in notes 26 and 27, *supra*, are not quite square upon the commerce question, assuming the suggested ground of distinction.

[30] See United States *v.* Doremus, 249 U. S. 86, 93 (1919); Hamilton *v.* Ky. Distilleries Co., *supra*, at 161; Evans *v.* Gore, 253 U. S. 245, 256 (1920); Smith *v.* Kansas City Title Co., *supra*, at 210.

[31] The power of taxation is one of the incidents of sovereignty. See 1 COOLEY, TAXATION, 3 ed., 7. It is dealt with expressly in the Constitution but in its nature is much like the "resulting powers" such as that of eminent domain. See Robert E. Cushman, *supra*, 295. It necessarily depends upon the same territory as do the states for revenue. See Flint *v.* Stone Tracy Co., 220 U. S. 107, 154 (1911). It has been said to be able to "overlap state authority more than can the commerce power." See Thomas Reed Powell, *supra*, 186.

[32] Such as the Fifth Amendment.

[33] Such as that against taxation of state governmental agencies. See note 20, *supra*.

[34] See Collins *v.* New Hampshire, 171 U. S. 30 (1898), in which a *state* inspection law was held bad as in substance a regulation of interstate commerce. But such

question remains. Is this "necessary result" forecast from the face of the statute alone, or does the court inquire into the actual subsequent events? If the latter, then the statute under discussion may be distinguished from that in the *McCray* case, if the earlier tax actually produces revenue and that on child labor does not.[35] But to make this distinction fruitful, the language of the *McCray* and other cases must be overruled so far as they hold that the face of the statute is the only basis of comparison with the Constitution. And it is submitted that *Hammer* v. *Dagenhart* need not go to that length, and perhaps should not.[36] Should it be settled that the correspondence upon the face of the statute is the only test, it will not be the only point in the division of powers at which the function of the court approaches the ministerial.[37]

FEDERAL CONTROL OF INTRASTATE RAILROAD RATES. — The power to regulate commerce left to the states by the commerce clause[1] includes power not only to adopt regulations over intrastate commerce which in no way affect interstate commerce, but also some that do. The scope of the states' power thus to affect interstate commerce is varying and is determined by two doctrines: (1) no power exists to burden directly interstate commerce, or to legislate as to matters requiring national uniformity, even in the absence of congressional action;[2]

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authorities must be used upon the present question with extreme caution, for the question in such cases is whether the state act invades a federal power, while the question here is not whether a federal act invades a state power, but passes the outer bounds of the federal power under which it purports to justify. See McCray *v.* United States, *supra*, at 60.

[35] See Annual Report of the Commissioner of Internal Revenue for the Fiscal Year ending June 30, 1921, pp. 16, 23.

[36] Whatever might be the desirability of such an express doctrine in the Constitution, it would be extraordinarily unfortunate if a narrow doctrine of "fraud on a power" should be taken over from property law and applied to the great powers of government upon a ground that those powers were so assimilated to ordinary agencies as to require that result by implication. As to motives, therefore, the McCray case must be right; especially considering (1) the almost impossibility of judicially determining the motives of a majority of Congress, (2) the undignified nature of such a proceeding, and (3) that a law well within the power in question might be invalidated because of the motives merely. Some of these considerations are of less weight as arguments against looking beyond the face of a statute to ascertain its necessary result. But a fourth is added, — that the Constitutionality of a "tax" might be made to turn upon whether Congress guesses with precise accuracy the rate of tax at which it will not be so discouraging as to preclude all revenue. Yet it is hard to say that from the point of view of the objects of the tax power it will be any loss to have the law unconstitutional unless Congress does make the guess correctly. The real answer to this is a question of judgment. Which is more desirable: that the national powers shall be capable of unified dealing with as many national problems as possible; or that the lobbies of organized minorities be compelled to seek the approval of forty-eight rather than one legislative body? It is the belief in the latter which gives rise to a desire to moderate the federal powers. The good and the evil must be taken or left together.

[37] *Cf.* the field of "political questions." Luther *v.* Borden, 7 How. (U. S.) 1 (1849); Pacific States Tel. Co. *v.* Oregon, 223 U. S. 118 (1912). Such a question being the issue raised by the writ of error to the state court in the last named case, the writ was dismissed for want of jurisdiction.

[1] CONSTITUTION OF THE UNITED STATES, Art. I, § 8, Par. 3.

[2] A state cannot prescribe rates to be charged for interstate transportation. Wabash, St. Louis & Pacific Ry. Co. *v.* Illinois, 118 U. S. 557 (1886). A state cannot